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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,
Respondents.

OPPOSITION OF RESPONDENT RICHARD CHRISMER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by Petitioner, would be presented for review in this case:

1. Whether the Petition for Writ of Certiorari is timely because it was filed more than ninety days following an Order of the Eighth Circuit Court of Appeals denying Petitioner's "Suggestion for Rehearing En Banc" although the Court of Appeals' Order was subsequently corrected to deny Petitioner's "Petition for Rehearing" and the Petition for Writ of Certiorari was filed within ninety days from the date of the corrected Order.

2. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because *Roe v. Wade*, 410 U.S. 133 (1973), was wrongly decided.

3. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because the subclass of "women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion" is not the type of class protected by 42 U.S.C. § 1985(3).

4. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because there are not sufficient allegations of state action required to support a 42 U.S.C. § 1985(3) claim based upon a Fourteenth Amendment right.

LIST OF PARTIES

The list of parties contained in the Petition for Writ of Certiorari is substantially correct. Respondent Richard Chrismer is an individual and hence does not make the listing required by the Court's Rule 29.1 of any parent or subsidiary corporations.

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OPPOSITION OF RESPONDENT RICHARD CHRISMER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PERCEIVED MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner's complaint was dismissed by the district court for failure to state a claim upon which relief could be granted. This dismissal was ultimately affirmed by an equally divided en banc decision of the Eighth Circuit Court of Appeals.

Because the complaint was dismissed on its face, the statement of the cause consists solely of the allegations contained in Petitioner's complaint and the procedural history below. The

only material misstatement Respondent perceives at this time is the conclusion drawn by Petitioner in the continuation of the footnote contained on page 3 of her petition regarding the timeliness of her petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY BECAUSE IT WAS FILED MORE THAN 90 DAYS FROM THE DATE THE COURT OF APPEALS INITIALLY DENIED PETITIONER'S REQUEST THAT THE EN BANC COURT REHEAR THE CASE. THE COURT OF APPEALS' SUBSEQUENT TECHNICAL CORRECTION OF ITS ORDER DENYING THE PETITION FOR REHEARING DID NOT TOLL THE TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI.

On January 15, 1988 the United States District Court for the Eastern District of Missouri entered its order dismissing Petitioner's complaint, without prejudice, for failure to state a claim upon which relief could be granted. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On July 10, 1990 the Eighth Circuit Court of Appeals, by a 2 to 1 decision, reversed the decision of the District Court. *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990).

On July 24, 1990 defendants filed their petition for rehearing with suggestion for rehearing en banc. On September 7, 1990 the Eighth Circuit Court of Appeals granted the suggestion for rehearing en banc and vacated the July 10, 1990 panel opinion. *Id.* at 228. Following supplemental briefing and oral argument the judgment of the District Court was affirmed on October 24, 1990 by an equally divided en banc court of appeals. *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1991).

Thereafter Lewis filed a petition for rehearing by the en banc court. By an order dated December 7, 1990 the Court of Appeals stated: "Appellant's suggestion for rehearing en banc has been considered by the court and is denied for reason of the lack of a

majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied." (App. 35) By an order dated December 17, 1990, the Court of Appeals amended its order of December 7, 1990, by striking the last full sentence of the order. (App. 34) Finally, on January 10, 1991, the Court of Appeals entered an order which read:

> On the court's own motion, the orders of December 7, 1990, and December 17, 1990, are hereby vacated.
>
> Appellant's petition for rehearing has been considered by the court and is denied. (App. 35)

A petition for certiorari in a civil case must be filed within 90 days of the entry of the judgment below. 28 U.S.C. § 2101(c) (1982). "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. ___, 110 S. Ct. 1651, 1660 (1990). A petition for rehearing timely presented to the Court of Appeals tolls the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing. *Id.*; Sup. Ct. R. 13.4 (1990). Furthermore, only a proper petition for rehearing authorized by Rule 40(a) of the Federal Rules of Appellate Procedure tolls the period for seeking certiorari; a suggestion for rehearing en banc permitted by Rule 35(b) of the Federal Rules of Appellate Procedure does not toll the period. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1660 n. 13, Sup. Ct. R. 13.4 (1990).

Accordingly, in order for Lewis' petition for writ of certiorari to be considered timely, the pleading she filed on November 6, 1990, both must be a petition for rehearing authorized by Rule 40(a) and the effective date of its denial by the Court of Appeals must have been January 10, 1991, as opposed to the Court of Appeals' earlier orders of December 7 and December 17, 1990.

This Court has recognized that "[t]he Court of Appeals of course cannot make the record what it is not. The time for

applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending the time." *Missouri v. Jenkins*, 110 S. Ct. at 1662. The Court of Appeals' subsequent correction of its December 7 order does not change the impact of that order; the Court of Appeals denied the suggestion for rehearing en banc on December 7, 1990.

In *Missouri v. Jenkins, supra*, the Court of Appeals amended its prior order nunc pro tunc to insure that the final order that was ultimately entered accurately reflected the action taken on the earlier date. *Id.* Likewise, the Court of Appeals' order of January 10, 1991 in this case does not more than amend the record to correctly reflect the action which was taken by the Court of Appeals on December 7, 1990. *F.T.C. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 211-212 (1952).

Because the petition for writ of certiorari was not filed within 90 days from December 7, 1990, this Court has no jurisdiction to grant the writ and it should be denied.

II.

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILING TO STATE A CLAIM OR CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1985(3) BECAUSE *ROE V. WADE* WAS WRONGLY DECIDED.

It is not necessary to reference the great amount of litigation and commentary spawned by *Roe v. Wade*, 410 U.S. 113 (1973). The subject of abortion has been highly controversial. There has been a debate whether *Roe* was correctly decided.

Petitioner argued below and assumes in the current Petition: "There is no question but that the abortion rights as originally

derived by the Supreme Court is pinned on the Fourteenth Amendment's guarantee of privacy and liberty." (Appellant's Brief at 22-23).

In *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3077 (1989), Justice Blackmun, dissenting, stated the intendment of the plurality opinion in that matter was "that *Roe* is no longer good law." Justice Scalia, concurring, stated: "... I share Justice Blackmun's view ... that [the decision] effectively would overrule *Roe v. Wade*, (citation omitted). I think it should be done, but would do it more explicitly." *Id.* at 3064.

Respondent also believes *Roe* and its progeny were wrongly decided. *Webster v. Reproductive Health Services, supra*, at 3064-3067 (Scalia, J. concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-797 (1986) (Burger, C.J., O'Connor, J., Rehnquist, J., and White, J., dissenting); *Doe v. Bolten*, 410 U.S. 179, 221-223 (1973) (White, J. and Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171-178 (1973) (Rehnquist, J., dissenting).

Petitioner will no doubt concede that if there is no "right to an abortion" then Petitioner has no claim under 42 U.S.C. § 1985(3). Thus, a fundamental issue is the viability of such a "right" in light of *Webster v. Reproductive Health Services, supra.*

III.

CERTIORARI IS NOT WARRANTED BASED UPON PETITIONER'S ARGUMENT THAT WOMEN SEEKING ABORTIONS ARE A PROTECTED CLASS UNDER 42 U.S.C. § 1985(3) BECAUSE (A) IN ORDER TO CONSTITUTE A PROTECTED CLASS THE MEMBERS MUST SHARE EITHER INHERITED OR IMMUTABLE CHARACTERISTICS OR THE ALLEGED CLASS-BASED DISCRIMINATION MUST RESULT FROM THE CLASS MEMBERS' POLITICAL BELIEFS OR ASSOCIATIONS, AND FURTHER, *CERTIORARI* IS NOT WARRANTED BASED UPON PETITIONERS ARGUMENT THAT WOMEN SEEKING ABORTIONS ARE A PROTECTED CLASS UNDER 42 U.S.C. § 1985(3) BECAUSE THE LEGISLATIVE HISTORY OF THAT STATUTE CLEARLY SHOWS THAT CONGRESS DID NOT INTEND TO PROTECT GENDER BASED DISCRIMINATORY ANIMUS.

A.

A conspiracy is within the scope of 42 U.S.C. § 1985(3) only if it is motivated by some class-based, invidiously discriminatory intent.

> The language [of § 1985(3)] requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (emphasis in original; footnotes omitted). Lewis' complaint fails to allege a conspiracy motivated by *class-based* invidiously discriminatory

intent. Accordingly, the district court did not err in dismissing Lewis' complaint for failure to state a claim upon which relief can be granted.

Lewis alleges in her complaint that the defendants have engaged in a conspiracy "to prevent as many women as possible from obtaining abortions." (App. 42, Complaint ¶ 14). Lewis' allegation concerning the purported § 1985(3) protected class is as follows:

> The conspiracy is therefore motivated by an invidiously discriminatory animus toward a class of women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion.

Section 1985(3) does not provide a cause of action for every alleged conspiracy to deprive a person or persons of constitutionally protected rights, rather, it is intended to protect only against those conspiracies which are the result of class-based animus. Not every "class", however, gives rise to protection under § 1985(3).

The Sixth Circuit Court of Appeals has succinctly stated the type of classes which are within the protection of the statute.

> We hold that the class of individuals protected by the "equal protection of the laws" language of the statute are those so-called "discreet and insular" minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons protected under the "equal privileges and immunities" language of the statute are those individuals who joined together as a class for the purpose of asserting certain fundamental rights.

Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980).

Accordingly, to successfully allege a class entitled to protection under § 1985(3) Lewis must be able to plead "membership in some group with inherited or immutable characteristics (e.g., race, gender, religion or national origin), or that the discrimination resulted from the plaintiff's political beliefs or associations," *Galloway v. Louisiana*, 817 F.2d 1154, 1159 (5th Cir. 1987). Additionally, Lewis must show that the defendants' alleged wrongful conduct is a result of Lewis' class membership. By blurring together the equal protection and privileges and immunities language in the statute, Lewis has attempted to manufacture a protected class where none exists. By examining the distinction between an equal protection and an equal privileges and immunities class, it is apparent that Lewis has failed to allege a class protected by § 1985(3).

1. EQUAL PROTECTION CLASS

The class of individuals intended to be protected by the "equal protection of the laws" language of § 1985(3) are "those so-called 'discreet and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics." *Browder*, 630 F.2d at 1150. Although originally intended to protect against racial discrimination, some Courts of Appeals have extended protection under § 1985(3) to conspiracies that discriminate against persons based on gender. *See Galloway*, 817 F.2d at 1159.[1] However, the alleged conspiracy in Lewis' complaint is not driven by gender-based animus. The decision to seek an abortion triggers the alleged conspiracy, not the incidental fact that women are the only group who can become pregnant and therefore consider seeking an abortion.

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[1] Respondent indeed argues in the text *infra* that the legislative history of the Ku Klux Klan shows the intent only to protect Blacks and their supporters.

In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), the court held that a complaint that alleged (a class of women who seek abortions and are deprived of that care by the defendant's action) failed to state a cause of action under § 1985(3). In rejecting the plaintiff's argument that such a class was protected by the statute, the court reasoned as follows:

> The Court disagrees with the proposition that any "particular [sub]class of women" is a protected class.[4] For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based because it separates persons of the same gender from each other and, obviously, on a basis other than by gender. The inquiry, thus, must be made without respect to gender, i.e., it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the § 1985(3) analysis.
>
> ---
>
> [4] If this principal were carried to its logical conclusion, the following illogical result would obtain: Because women are a protected class, any subclass of women is also a protected class. Because men are not a protected class any subclass of men is also an unprotected class. Therefore, e.g., a class of homosexual women would be protected, but a class of homosexual men would not be.

National Abortion Federation, 721 F. Supp. at 1171.

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[2] Several Courts of Appeals have found women seeking abortions to be a class entitled to protection under § 1985(3). *See New York State National Organization For Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989), *aff'd* 919 F.2d 857 (3d Cir. 1990); and *National Organization For Women v. Operation*

(Footnote 2 continued next page)

The conspiracy alleged by Lewis is not motivated by any gender-based animus, but is a result of the "abortion-seeking" trait of individual women. Lewis' complaint fails to allege any class-based animus under the equal protection prong of § 1985(3).[2]

In analogous circumstances to the case at bar, patients, doctors providing abortions, an abortion clinic and staff, and an organization providing escort services to the abortion clinic were found not to be classes protected by § 1985(3). *Roe v. Abortion Abolition Society*, 811 F.2d 931, 935 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987). The reasoning of *Roe* is equally persuasive in the present case:

> The Plaintiffs argue that the class in this case consist of those people who do not agree with the Society defendants' point of view. The class test is turned on its head, however, if a class is defined as all those who are not of the same class as the conspirators, for example, all those who do not believe in a specific religious faith or political party — or all those who do not have a religiously based opposition to abortion. Logic may define as two separate classes "we" — all those who share a certain belief — and "they" — all those who do not hold that tenet —, but § 1985(3) is aimed at an animus against those who have the despised trait. In this case, the Plaintiffs do not limit the defendant class to

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(Footnote 2 continued)

Rescue, 726 F. Supp. 1483, 1492 (E.D. Va. 1989), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 1070, 112 L.Ed.2d 1176 (1991). Each of these cases share the same flaw recognized by the court in *National Abortion Federation* —where an alleged class based animus is directed at a subset of women and not women as a class, the animus must be based upon something other than gender. Accordingly, a subclass of "women seeking abortions" is not subject to gender-based discrimination and therefore does not constitute a protected class under the equal protection prong of § 1985(3).

> persons who are members of a particular religious denomination but describe them only by their adherence to a specific belief that transcends denominational religious lines. Correspondingly, the Plaintiffs define themselves only as "persons who do not share defendants' religious beliefs about abortion," which is no more a common trait or characteristic than would be a belief in using seat belts or in an ever-expanding universe.

The District Court below seized upon the language in *Roe*, and compared the opinion to the language of the present Complaint. The first paragraph of the Complaint specifically alleges defendants' opposition to abortion as a result of a "moral-religious standard for all of society as well as themselves...." (Appendix, p. 36, Complaint, ¶ 1.)

2. EQUAL PRIVILEGES AND IMMUNITIES

The second aspect of § 1985(3) protects "those individuals who joined together as a class for the purpose of asserting certain fundamental rights." *Browder*, 630 F.2d at 1150. This prong of § 1985(3) has received limited class-based animus on the basis of the members' political views. *Galloway*, 817 F.2d at 1159; *see Perez v. Cucci*, 725 F. Supp. 209, 248-50 (D.N.J. 1989), *affirmed without opinion*, 898 F.2d 142 (3d Cir. 1990) (cataloging cases where the courts have either granted or denied § 1985(3) protection to politically based classes).

The mere fact that Lewis has alleged that defendants have conspired to deprive her of a fundamental right does not place her in a protected class. Lewis has alleged no "joining" or "associating" of herself with a group committed to advancing the fundamental rights which she alleges is the basis of the conspiracy.

While such a group does not necessarily have to be a formal political organization, the group must have some form:

> There need not necessarily be an organization structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath to fealty, it need not be an initiation right; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group.

Means v. Wilson, 522 F.2d 833, 839-40 (8th Cir. 1975) (quoting *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215 (5th Cir. 1975)). Apart from Lewis' abortion-seeking conduct, she has alleged no association with any group which would support the class-based animus requirement of § 1985(3).

Lewis' allegation that defendants conspired to deprive her of a fundamental right is insufficient to place her in a protected class. "If defendants tried at random to deprive anyone of exercising [a fundamental] right, their motive for the deprivation would touch all equally, without discrimination." *Browder*, 630 F.2d at 1153. Lewis' complaint is therefore insufficient under the second prong — equal privileges and immunities — of § 1985(3).

Because § 1985(3) requires intent to deprive a person of equal protection or equal privileges and immunities, there must be some racial or otherwise class-based invidiously discriminatory animus behind the alleged conspirators' actions. Lewis must show membership either in some group with inherited or immutable characteristics or that the alleged discrimination resulted from her political beliefs or associations, *and* that the alleged conspiracy was sparked by her membership in the class. Lewis has neither alleged a conspiracy triggered by her membership in an immutable class (women) nor has she alleged that she is a member of any other politically-based class against which the alleged conspiracy was directed. Lewis has alleged nothing more than a non-class-based attempt by defendants to dissuade

women from obtaining a voluntary abortion. Lewis' complaint fails to allege a class-based animus sufficient to state a cause of action under § 1985(3). The petition for writ of certiorari should be denied.

B.

As construed in *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971), a claim under § 1985(3) must allege and prove: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury to his person or property as a result of the deprivation. The discrimination must be motivated by some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.[3]

Assuming, *arguendo*, the question whether women or women seeking an abortion is a gender protected class under § 1985(3), the issue must be faced in light of the legislative history and

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[3] *Griffin v. Breckenridge*, 403 U.S. 88 (1971) involved racial based animus and the right to interstate travel. The Court refrained from deciding whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3). *Id.* at 101 n. 9. Petitioner concedes the current matter does not involve the right to interstate travel. (Petition for Writ of Certiorari at 14 n. 1). This distinguishes the case at bar from *Griffin v. Breckenridge, supra*, and *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). As the right to interstate travel is not triggered in the present action, Petitioner must plead and prove State action as more specifically argued in the text *infra*. *See generally, United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830-833 (1983), *rehearing denied*, 463 U.S. 825 (1983), *on remand*, 715 F.2d 161 (5th Cir. 1983).

background of the statute. A careful review of the statute's history would indicate that the district court properly dismissed the present Complaint and that the Eighth Circuit's affirmance of the dismissal is not in conflict with decisions of this Court.

In *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 385 (1979), Justice Stevens, in a concurring opinion, stated:

> Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985(3) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights — let alone rights created by statutes which had not yet been enacted — I agree with the Court's conclusion that it does not provide Respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.

More recently, in *United Brotherhood of Carpenters and Joiners of America Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983), the Court determined that an alleged conspiracy to infringe on the fourteenth amendment rights of employers who refuse to join a union did not violate § 1985(3) since it was not proved that the State was involved in the conspiracy or that the aim of the conspiracy was to influence the activity of the State. Further, the Court found there was no racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action. The Court held that § 1985(3) could not be construed to reach conspiracies motivated by economic or commercial animus.

Justice White, in speaking for the majority, reviewed a portion of the legislative history of the so-called Ku Klux Klan Act and stated:

> In the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro. Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or to do other injury to a competing group by use of otherwise unlawful means. . . . 463 U.S. at 836.

The need to examine the civil rights statutes in view of their historical origins was emphasized in *Shaare Teflila Congregation v. Cobb*, 481 U.S. 615, 618 (1987). There, the question was viewed not as whether Jews were considered to be a separate race by "today's standards," but whether at the time the statute was enacted and adopted Jews constituted a group of people that Congress intended to protect under 42 U.S.C. § 1982. *Id. See also, St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

Despite the plethora of litigation on the issue of whether women seeking abortions are a protected class under § 1985(3), the fundamental question remains whether women, women seeking abortions, or other gender based groups are within the class of people Congress intended to protect at the time the

statute was enacted.[4] Historically, the "right to an abortion" was first recognized some one hundred years after the enactment of the Ku Klux Klan Act in *Roe v. Wade*, 410 U.S. 113 (1973). If the correct class is women seeking abortions, no decision or commentator has suggested that the legislative history of the Ku Klux Klan Act specifically spoke to protection of that particular class.

Other courts, taking a historical view of § 1985(3), have determined that the section does not apply beyond Blacks and their civil rights supporters. *Wilhelm v. Continental Title Company*, 720 F.2d 1173, 1176-1178 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 160 (4th Cir. 1985).[5] These courts have limited the classes or class which § 1985(3) protected due to the legislative history of the Act and to prevent the evolution of a general federal common law of torts arising from § 1985(3) cases. *See, e.g., Brown v. Reardon*, 770 F.2d 896, 907 (10th Cir. 1985).

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[4] A listing of the litigation involving § 1985(3) claims and anti-abortion protesters is contained in the Petition for Writ of Certiorari, p. 13-14, n. 4, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (United States Supreme Court October Term, 1990).

[5] *See also, Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1985), *cert. denied*, 479 U.S. 1054 (1986); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (finding a discharged county employee protected but noting that *Scott* "raises doubts about the legitimacy of plaintiff's claims"; the panel decided the case on a technical issue that one panel of the Sixth Circuit could not overrule the decision of a prior panel unless inconsistent with the decision of the United States Supreme Court); *Bois v. Marsh*, 801 F.2d 462, 476, 255 U.S.App. D.C. 248 (D.C. Cir. 1986); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1486-1487 (7th Cir. 1985) (finding that a handicapped individual is not a member of a protected class in light of the Congressional purpose underlying § 1985(3); noting that the Ku Klux Klux Act was to protect against racially broad-based animus by the Ku Klux Klan and white supremacists).

The Seventh Circuit has recently stated in *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985):

> We agree with the Fourth Circuit's observation in *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985), that *Scott* calls for a reconsideration of the status of purely political conspiracies under § 1985(3), as the later decision is a powerful indication, that when squarely confronted with the question, the Court would not include such conspiracies within the scope of the provision. As the obligation of the subordinate jurisdiction is to divide the direction of the Court, the considered dictum in *Scott* cannot be ignored. The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet the unusual condition in the Reconstruction Era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than Blacks. The import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against Negroes and their supporters.[6]

Similarly, in *McCord v. Bailey*, 636 F.2d 606, 204 U.S.App. D.C. 334 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 719 (1981), the District of Columbia Circuit performed a comprehensive and scholarly analysis of § 1985(2). The Court noted the statute had its roots in the racial violence that erupted in the South at the end of the Civil War. The Ku Klux Klan had been organized in 1866.

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[6] *But Cf., Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) (stating that § 1985(3) applies to sex discrimination) and *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988) (stating there is an open question if more than racial conspiracies are encompassed within § 1985(3)).

The subsequent five years had been marked by an increasing number of attacks, often fatal, against Black and Union sympathizers including many federal officials. By 1871, the turbulence in the South had caused considerable consternation in Congress. On March 23, 1871, President Grant asked for legislation giving him additional authority to control the apparent chaos. Throughout the deliberations that followed in the House and Senate, a recurring theme was that of the need to preserve orderly government and to prevent the spirit of insurrection running rife in the South. *Id.* 614-615. This review of the legislative history was cited with approval in *Kush v. Rutledge*, 460 U.S. 719, 717 n. 10 (1983).

Perhaps the most cogent and exhaustive review of the legislative history of the Ku Klux Klan Act is contained in Comment, *A Construction of § 1985(C) in Light of its Original Purpose*, 46 U.Chi.L.Rev. 402 (1979). The author recounts the violent activities of the Ku Klux Klan and similar organizations that caused great alarm among the members of the Forty-Second Congress. The Republicans especially found Klan violence troubling because they were convinced it was politically motivated. Such was the conclusion stated in the majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States: "It is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is composed of members of the Democratic or Conservative Party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." *Id.* at 408. The immediate goal of the Klan as seen by the Republican majority, was to wrest control of the State governments from the Republican Party and to re-establish Democratic hegemony in the South. The ultimate goal of the Klan's usurpation of power through terror and political subversion, the Republicans believed, was to overthrow reconstruction policy including the recent amendments to the Constitution, thereby withdrawing from the freed men the equal

protection of the laws and equal privileges and immunities that policy secured.

One recent decision has rejected gender based discrimination for Caucasian males as not within the class Congress intended to protect under § 1985(3). *Moore v. City and County of Denver, Colorado*, 744 F. Supp. 1028, 1031 (D. Colo. 1990).[7]

Respondent's arguments make clear that Plaintiff is not a proper member of any class which would avail itself of the protection of § 1985(3).

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[7] Several other recent cases have discussed the groups or classes which § 1985(3) was intended to protect. *McCalden v. California Library Association*, 919 F.2d 538, 546 (9th Cir. 1990) (Holocaust Revisionist not "singled out for federal protection"); *Garrie v. Gray, Inc.*, 912 F.2d 808, 813 (5th Cir. 1990) ("whistle blowers" are not a protected class); *Averitt v. Cloon*, 796 F.2d 195, 198 (6th Cir. 1986) (class of individuals with prior criminal convictions not a protected class); *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114, 128-129 (6th Cir. 1985) (class of dissident union members not protected); *Brown v. Reardon*, 770 F.2d 896 (10th Cir. 1985) (political affiliation not a protected class).

There is indeed some support in other Circuits for the proposition that the victims of a non-racial political conspiracy may recover under § 1985(3). *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985) (collecting cases and noting, however, several were decided prior to *Scott*). Some courts have found gender-based classes to meet the requirements of § 1985(3) after *Scott*. *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1492-1493 (E.D. Va. 1989) (collecting cases), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 1070 (1991). *See also*, text, *supra*, in Section I.

IV.

CERTIORARI IS NOT WARRANTED BECAUSE THE EIGHTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS OR STATE COURT IN THAT THE EIGHTH CIRCUIT'S ORDER WOULD REQUIRE PETITION TO PLEAD STATE ACTION AS OPPOSED TO STATE INACTION FOR A CLAIM UNDER 42 U.S.C. § 1985(3).

Petitioner asserts the "right to an abortion" on the Fourteenth Amendment's guarantee of privacy and liberty. *Roe v. Wade, supra.* An alleged conspiracy to infringe upon rights guaranteed by the Fourteenth Amendment must prove the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Scott, supra*, at 830-832. The due process clause of the Fourteenth Amendment protects individuals only against governmental interference and not against intrusions by private entities. *Id.* at 831-832 and cases cited therein.

Petitioner alleges that the conspiracy was a "private conspiracy." (Appendix, p. 37, Complaint, ¶ 2.) Private conspiracies without State action are insufficient to support a claim under § 1985(3). *See, e.g., Grimes v. Smith*, 776 F.2d 1359, 1367 n. 16 (7th Cir. 1985). Indeed, the necessity for State Action in a 1985(3) claim formed the basis for the dissent below which found no State action based upon the allegations of the Complaint. *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318, 326-328 (8th Cir. 1990). (Floyd R. Gibson, S.J., dissenting.)

Petitioner claims State action by the "refusal of the Missouri Attorney General, upon the complaints and reports that have been made to him about the methods of the fake abortion clinics

in general and A-A-A in particular, to invoke the broad statutory and common law remedies at his disposal . . . and further encouraged the defendants' conspiracy by his public pronouncement that the defendants' advertising does not, in his opinion, constitute misrepresentation." (Appendix, p. 43, Complaint, ¶ 16.) Petitioner does not allege in the Complaint that the Missouri Attorney General's interpretation of Missouri law was erroneous or that he authorized the acts of Respondents. State inaction cannot constitute State action for purposes of § 1985(3).

The notion that State inaction constitutes State action was specifically rejected in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978). In *Flagg Brothers*, the Court upheld the constitutionality of the New York Warehousemen's lien. In so holding, the Court noted that if mere denial of relief was considered sufficient encouragement to make the State responsible for private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. *See also, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (stating that the inquiry must be whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State"); Wright, *State Action and State Responsibility*, XXIII Suffolk U. L. Rev. 685, 706-708 (1989); Comment, *State Inaction and § 1985(3): United Brotherhood of Carpenters and Joiners of America v. Scott*, 71 Iowa L. Rev. 1271 (1986).

Arguably, all private action involves interaction with the government and the implicit sanctions resulting from the alleged continued lack of enforcement of constitutionally protected rights would bring most private actor violations within the scope of the Fourteenth Amendment. Thus, under Petitioner's argument, State action could be found in almost any private activity. This is not the mandate of *Flagg Brothers*.

In *Doe v. Keane*, 658 F. Supp. 216 (W.D. Mich. 1987), the Plaintiff contended that there was sufficient State action because of the refusal or failure of the State of Michigan to prohibit surrogate parenting transactions. The Court rejected the argument: "Where the initiative comes from a private actor and not from the state, [it] cannot make a private act a state act for purposes of the Fourteenth Amendment." *Citing, Jackson v. Metropolitan Edison Co., supra.* 658 F. Supp. at 220-221.

In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) the § 1985(3) claimants contended there was sufficient evidence of State involvement on the part of anti-abortion protesters. The evidence of State involvement put forth by the Plaintiffs included the fact that one of the protesters was a police patrolman who may have exercised apparent authority on behalf of the police department. Moreover, Plaintiffs complained that the police department did nothing to discourage the public perception that it supported the protesters.

In reviewing a conflicting record on the State involvement, the court stated:

> In deciding whether there has been State action necessary to support a claim under 1983, we have required that the State official *affirmatively act* in support of the violation. Thus, "a person acts under color of State law *only when exercising* power 'possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law.' " (Citations omitted.) Put another way, for State action the activity must amount to "police intervention and aid" of the private group. (Citation omitted.)
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> . . . As the District Court noted in today's case, "[a] State's mere acquiescence in private action does not convert that action into that of the State." *See, Flagg Brothers,*

436 U.S. at 164, 98 S. Ct. at 1737 ("[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.") Because the MWMC has shown neither that women have been deprived of the right to have an abortion nor that anyone was acting under color of State law, it is unlikely that it will prevail on the merits. 866 F.2d at 792-93.[8]

Indeed, it has even been suggested by some commentators that "very strong encouragement" by State officials might not result in State action where the challenged activities of private persons were themselves worthy of some constitutional deference as the importance of associational rights would seem to require that no State action be found unless the acts were solely the products of official encouragement. Rotunda, Nowak and Young, *Constitutional Law: Substance and Procedure*, § 16.03, p. 173 (1986).

The present action is unlike *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). *Bray* involved allegations of interstate travel which the present Petitioner concedes are not involved in the current Complaint. (Petition for Writ of Certiorari at 14 n. 1.) Claims under § 1985(3) that involve the right of interstate travel, rather than a right emanating from the Fourteenth Amendment due process clause, may not require State action. *Griffin v. Breckenridge, supra*, at 106-107.

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[8] Assuming that the Attorney General's failure to act was an authorization to defendants, which the complaint does not specifically allege, Professor Tribe indicates that such "authorization" is insufficient to create State action. He comments that when the State "merely authorizes" a given private action — "imagine a green light at a street corner" authorizing pedestrians to cross traffic — that action cannot automatically become one taken under State authority in any sense that makes the Constitution applicable. Tribe, *American Constitutional Law*, 1705 (2d ed. 1988)

Thus, the decision of the Eighth Circuit affirming the dismissal of the Complaint by the District Court is not in conflict with a decision of another United States Court of Appeals on the same matter or a State Court of last resort. There is no basis under Rule 10 for seeking review of the dismissal of the Complaint on this issue.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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